UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

UNITED STATES OF AMERICA	)	
	)	
v.	)	No. 16-CR-068-S-LDA
	)	
PATRICK CHURCHVILLE,	)	
Defendant	)	
	)	

DEFENDANT'S SENTENCING MEMORANDUM

I. INTRODUCTION

The defendant, Patrick Churchville, is before the court for sentencing, having pled guilty to charges of wire fraud and tax evasion.[1] Briefly, the facts[2] are that during the summer of 2010, Mr. Churchville, while working as an investment adviser[3] responsible for the management of several million dollars in investor funds[4], became aware that a significant portion of the investments had been lost as a result of fraudulent and misleading representations and conduct by others, who were subsequently convicted in the United States District Court for the District of

[1]The charges in the Information were agreed to by the defendant and the government after lengthy negotiations to identify the conduct and streamline the case for sentencing purposes, as it was clear from very early on that the defendant intended to plead guilty. Although he was not in a position to cooperate with the government in the conventional sense, i.e., in a way that would lead to the prosecution of other individuals (and consequently generate a motion pursuant to U.S.S.G. §5K1.1), he has been extremely cooperative with the Receiver appointed by this court over ClearPath Wealth Management. He has also cooperated (to the extent possible in typical parallel litigation circumstances) with the SEC in its civil and administrative actions. His cooperation is outlined below in Section II.D.

[2]To facilitate the plea and to minimize evidentiary issues at the sentencing phase, an agreed statement of facts (not attached to the plea agreement) was presented to the court by the parties at the defendant's change of plea hearing. It is submitted herewith as Exhibit A. Other relevant and important facts are set forth as necessary in this Memorandum and, in particular, in footnote 5 below, and the Exhibits referenced there.

[3]Mr. Churchville was the Manager and sole owner of ClearPath Wealth Management, LLC.

[4]The investments had begun in approximately 2008.

Maryland.[5] Instead of notifying both the SEC and the investors of what he had learned, Mr. Churchville attempted to replace the lost investor funds by embarking on a Ponzi scheme of his own, executed by recycling other monies, some from the same investors and some from others, through new vehicles, searching for investments with returns sufficient to both cover the losses his investors incurred in the Maryland scheme, as well as generate sufficient returns on the new

[5]The facts of the Maryland case (which are critical to understanding and appreciating, inter alia, the defendant's arguments concerning determination of the loss amount), are set forth in detail in the Indictment filed September 4, 2013 in the United States District Court for the District of Maryland, in the matter of United States v. Richard Shusterman and Jonathan Rosenberg, No. 1:13-cr-00460-JKB (submitted herewith as Exhibit B-1). In summary, from approximately March of 2007 until July of 2010, Shusterman and Rosenberg, along with Douglas Kuber and Robert Feldman, ran an extensive Ponzi scheme designed to defraud investors and lenders in medical accounts receivable of more than $275 million. (See, Section II.A.1.a.iv below, as well as the Exhibits referenced here). In August of 2012, Kuber agreed to plead guilty to a one-count Information charging him with conspiracy to commit wire fraud (see Kuber's plea agreement, submitted herewith as Exhibit B-2). A compressed version of the scheme to defraud is outlined in the Information filed against Kuber in case number 1:12-cr-00494-JKB (submitted herewith as Exhibit B-3), and the detailed Statement of Facts agreed to by Kuber was attached to his plea agreement (Exhibit B-2) when filed with the court on October 15, 2012. Kuber (who had been Rosenberg's partner) cooperated with the government in its investigation of what eventually became the case against Shusterman and Rosenberg. On August 9, 2016 (following Shusterman's conviction), Kuber was sentenced to a term of incarceration of 48 months, and to pay restitution in excess of $105 million (see Kuber Judgment, submitted herewith as Exhibit B-4).

On August 30, 2013, Feldman (who had been Shusterman's partner) entered into a plea agreement with the government and, like Kuber, agreed to plead guilty to a one-count Information charging him with conspiracy to commit wire fraud (see Feldman's plea agreement, submitted herewith as Exhibit B-5). A longer and more detailed version of the scheme to defraud is outlined in the Information filed against Feldman in case number 1:13-cr-00457-JKB (submitted herewith as Exhibit B-6), and a similar detailed Statement of Facts agreed to by Feldman was attached to his plea agreement (Exhibit B-5) when filed with the court on September 3, 2013. Feldman also cooperated with the government in the case against Shusterman and Rosenberg. On August 25, 2016, Feldman was sentenced to a term of incarceration of 46 months, and ordered to pay restitution in excess of $148 million (see Feldman Judgment, submitted herewith as Exhibit B-7).

This was the scheme in which Mr. Churchville and his ClearPath investors were victims. This is not contested by the government. Mr. Churchville was then unaware of Mr. Rosenberg's involvement as a perpetrator. When Shusterman's Ponzi scheme collapsed in 2010, no one had yet been charged, but Mr. Churchville should have then gone to the SEC. He did not. Instead, he chose to try to recoup Clearpath's losses without letting his investors know what had happened. While there is no way to know when Kuber and later Feldman began to cooperate with the government, Rosenberg's involvement in the scheme did not become known to Mr. Churchville until shortly before Rosenberg was indicted with Shusterman in September of 2013. Until then, Mr. Churchville, unaware of Rosenberg's duplicity, was working with Rosenberg to conceal and recover the losses to Mr. Churchville's investors resulting from the Maryland scheme.

Eventually, the government offered Rosenberg (who was by then a charged defendant) a deal. On January 6, 2016, Rosenberg agreed to plead guilty. Like Kuber and Feldman before him, Rosenberg entered into a plea agreement (see Rosenberg plea agreement, submitted herewith as Exhibit B-8). He would plead guilty to Count 1 of the Indictment (Exhibit B-1), charging him with conspiracy to commit wire fraud; and he, too, cooperated with the government against Shusterman. On August 10, 2016, Rosenberg was sentenced to a term of incarceration of 60 months, and ordered to pay restitution in excess of $148 million (Rosenberg Judgment, submitted herewith as Exhibit B-9). Shusterman was convicted after a 22-day trial, and on December 23, 2016 was sentenced to a term of incarceration of 18 years and ordered to pay restitution in excess of $171 million.

investments. This house of cards collapsed in early 2014, before he achieved his goal, leaving investors with losses in the millions of dollars.[6] In addition, while this debacle was in progress, Mr. Churchville misappropriated some investor funds for his personal use in connection with a real estate purchase; this discrete transaction is the subject of Count 1 of the Information, and forms the basis of the tax evasion charge.[7]

II. SENTENCING CONSIDERATIONS

The court needs no education on sentencing mechanics. The provisions of 18 U.S.C. §3553(a), and their extensive interpretive case law are well-established. Getting to the heart of the matter, the court must first undertake a calculation of the advisory sentencing guideline range, and then consider the other statutory sentencing factors. United States v. Jiménez-Beltre, 440 F.3d 514, 518 (1st Cir. 2006) (en banc), cert.denied, 549 U.S. 1118 (2007). The totality of these circumstances, once identified, is to be used to determine a sentence sufficient but not greater than necessary to achieve the goals of the sentencing process.[8] This case requires a significant variance from the advisory guideline range (whatever it turns out to be[9]), to meet the

[6]The correct loss figure is the subject of some controversy, as will be discussed in greater detail below. See Section II.A.

[7]The use of approximately $2.5 million for the purchase of a home in Barrington in 2011 was a discrete occasion on which Mr. Churchville directly diverted investor funds to his own use. Other than charging placement fees in connection with the RP investments (see footnote 33, below), all other losses for which he was responsible—i.e., resulting from his criminal conduct—were incurred in his misguided attempt to clandestinely recover the original investment losses (caused by others) before they were discovered. In short, this was not a crime motivated by personal aggrandizement, or initiated for that purpose.

[8]Under the "parsimony clause" of 18 U.S.C. §3553(a), this court must impose a sentence that is "sufficient but not greater than necessary" to comply with the purposes set forth in 18 U.S.C. §3553(a)(2), which reflect "the need for the sentence to be imposed (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense; (B) to afford adequate deterrence to criminal conduct; (C) to protect the public from further crimes of the defendant; and (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner." 18 U.S.C. §3553(a)(2).

[9]The advisory guideline range is driven primarily by the loss amount. Using either the government's or the defendant's figures, the result is Draconian.

requirements of the statute; thus, the defendant will request a non-Guidelines sentence.[10] We believe that entreaty to be entirely warranted in this case.

A. Establishing The Guideline Range

When approaching the first phase of the process—establishing the Guideline Sentencing Range (GSR)—it is important to keep one thing very clearly in mind: "[t]he guidelines consider only the bad things a person has done in his life, not the good." United States v. Morgan, 2012 WL 1161417, *4 (E.D.Wis. 04/06/12)(Adelman, J.).

The presentence investigation report (PSR) has set the offense level at 39.[11] After a two-level reduction for acceptance of responsibility[12], and assuming an additional one level reduction at the request of the government[13], the final offense level would be 36. This translates into a shocking guideline sentencing range (GSR) of 188-235 months.

The offense level is driven largely by the loss calculation, which the probation department has set at approximately $26 million[14], and which, in and of itself, adds 22 levels to the base offense level of 7.[15] The defendant has contested this calculation, and in the course of meetings with the government seeking agreement on a restitution figure, has submitted that the accurate loss figure is approximately $6.6 million. The important consideration in this regard (discussed in detail at Section II.A.1.a., below), is connecting the loss amount to the defendant's criminal conduct as opposed to that of others—in this case, others whose criminal conduct was responsible for the defendant and his investors themselves being victims of a different—and much more extensive—Ponzi scheme—before the defendant engaged in his own efforts to conceal and recover the earlier losses.

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[10]See, Gall v. United States, 552 U.S. 38, 59 (2007); Pepper v. United States, 526 U.S. 476, 489-90 (2011). See also, United States v. Soto-Rivera, 811 F.3d 53, 59 n. 9 (1st Cir. 2016).

[11]PSR at ¶60. This figure includes several other enhancements. First is the adjustment for sophisticated means [see U.S.S.G. §2B1.1(b)(10)(C)](PSR at ¶47), which adds 2 levels; next is the adjustment for the defendant's status as an investment advisor [see U.S.S.G. §2B1.1(b)(19)(A)(iii)](PSR at ¶48), which adds another 4 levels; and third is the victim adjustment, which in this case adds 4 levels because there were more than 50 victims [see U.S.S.G. §2B1.1(b)(2)(B)](PSR at ¶46). Since the base offense level is 7 [see U.S.S.G. §2B1.1(a)(1)], and using the PSR's loss enhancement of 22 levels [see U.S.S.G.§2B1.1(b)(1)(L); PSR at ¶40], adding the other adjustments for sophisticated means (2), investment advisor (4), and number of victims (4) brings the total to a Level 39 (before Chapter 3 adjustments).

[12]U.S.S.G. §3E1.1(a).

[13]U.S.S.G. §3E1.1(b).

[14]PSR at ¶45.

[15]U.S.S.G. §2B1.1(a)(1).

If accepted by the court, the defendant's loss calculation would reduce the loss adjustment by 4 additional levels (to 18), thus reducing the final offense level to 32 (after acceptance of responsibility reductions), which would convert to a GSR of 121-151 months. Because the defendant is seeking a sentence well below either of these ranges, the materiality of the loss discrepancy is different than it might otherwise be; however, it is nevertheless significant because (a) it affects the extent to which the court is being asked to vary from the range[16]; (b) it dramatically alters what will be the court's eventual restitution order; and (c) probably most important from the defendant's perspective, it frames in proper context the defendant's criminal conduct, i.e., the conduct for which he should be held accountable.[17]

1. The Loss Calculation

a. The Facts

i. Introduction

The PSR incorrectly assessed a loss amount of $25,834,271.33 (PSR at ¶45), itemized as follows:

[16]See, United States v. Santa-Otero, 843 F.3d 547, 552 (1st Cir. 2016), quoting United States v. Dean, 414 F.3d 725, 729 (7th Cir. 2005)(Posner, J.).

[17]U.S.S.G. §2B1.1, Application Note 3(A)(i)("Actual loss" means the reasonably foreseeable pecuniary harm that resulted from the offense." [emphasis supplied]). See, United States v. Alphas, 785 F.3d 775 (1st Cir. 2015).

Nature of Scheme	Proposed Loss
House Purchase	$ 2,500,000.00
Receivable Partners	$17,402,943.28
Feingold O'Keeffe	$ 3,500,000.00
Receivable Partners Fees	$ 2,171,327.97
Fees Associated with House Purchase	$ 260,000.00
Total Proposed Loss	$25,834,271.33

The total loss number calculated by the Probation Officer is flawed in a number of respects.[18] First, it is anticipated that, at sentencing, the government will break down its suggested loss amount by investor, within each of the three investment vehicles Mr. Churchville offered them: (i) the Oppenheimer Public Market Series ("OPCO") investments; (ii) the Feingold O'Keeffe ("FOK") investments; and (iii) the Receivable Partners (RP) scheme. For the sake of simplicity, defense counsel will address separately each of the three investments.

ii. OPCO monies utilized by Mr. Churchville to purchase the Barrington House

The PSR sets the loss associated with the house purchase in Barrington at $2,500,000, which represents the funds the defendant diverted from the OPCO investment. While Mr. Churchville accepts that component of the loss calculation, he does not agree with the inclusion of an additional $260,000 vaguely identified as "fees [Mr. Churchville] took during the house scheme." There is no documentation or other information to support this figure.

[18]Counsel mean no disrespect towards the Probation Officer in evaluating her proposed final loss numbers. Quite frankly, it was a monumental task for the Probation Officer to calculate the loss numbers as she was not supplied with any of the source documents to unravel this admittedly complicated exercise. Counsel for the parties and the government agents have been working from source documents for many months in an attempt to arrive at a proper loss calculation under the Guidelines as well aid the court in settling the proper restitution figures, investor by investor, in this case. Even with the source documents in hand and a much better handle on the complicated series of investments made going back to 2008, the parties themselves have struggled to sort through all of the investors and investments to arrive at an accurate loss and restitution calculation in this case. The major disagreement, however, is with respect to the application of those numbers and the methodology as to how the court should arrive at the final loss numbers under U.S.S.G. 2B1.1(b).

iii. FOK losses resulting from Mr. Churchville's conduct

The PSR sets the loss resulting from Mr. Churchville's conduct with respect to the FOK investments.[19] Again, a number of investors invested in FOK and, although the FOK investments were made by Mr. Churchville, he leveraged the investment by using it as collateral for a $3.5 million line of credit he obtained with Commerce Bank.[20] Therefore, Mr. Churchville agrees that the losses he caused as a result of the FOK investments come to $3,500,000.

iv. The overinflated RP losses

The heart of the defendant's objection to the loss calculation goes to the PSR's failure to address the overlap between JER losses (incurred in the much larger Maryland Ponzi scheme, where it is undisputed that Mr. Churchville and his investors were victims[21]) and the subsequent RP investments charged in this case. In a nutshell, the defense asserts that the government improperly calculated the loss associated with the RP scheme by simply adding up the value of the investments funneled through the RP Ponzi scheme. This methodology is flawed and cannot support the guideline loss calculation in this case. In order to fully comprehend the basis for the defense objection, the court must first understand how the RP Ponzi scheme originated. Only then will the court be in a position to assess the true losses resulting from Mr. Churchville's conduct and to place this defendant in the proper context in imposing a fair and reasonable sentence, "sufficient but not greater than necessary", as mandated by 18 U.S.C. §3553.

[19]PSR at ¶45.

[20]Although this may be more appropriate to a restitution analysis (should it become necessary to engage in one), Mr. Churchville utilized the Commerce Bank line of credit, in part, to invest his initial investment in a company known as Capio Acquisitions V, LLC ("Capio") which turned out to be a very successful investment in health care receivables. See footnotes 33 and 34 below.

[21]See footnote 5 above; see also PSR at ¶¶7-11, 18-20.

Again, it is undisputed by the parties that Mr. Churchville and his investors were but a small subset of victims of a much larger (quarter of a billion dollar) Ponzi scheme orchestrated by Shusterman, Rosenberg and their co-defendants in the Maryland case. Unbeknownst to Mr. Churchville at the time, Rosenberg, Shusterman, Feldman and Kuber had conspired to defraud investors of hundreds of millions of dollars by claiming to be legitimate purchasers of healthcare receivables from hospitals across the country. Shusterman owned a company known as IPI whose main function was to raise funds in order to purchase the healthcare receivables at substantial discounts (pennies on the dollar). Rosenberg's role was to go out and find investors (like Mr. Churchville and his company Clearpath) to invest in Rosenberg's company (JER[22]) through a series of loans. Rosenberg represented that JER would utilize the capital it raised from Clearpath by loaning the funds to IPI (Shusterman's company) which in turn was required to purchase a specific, identifiable tranche of healthcare receivables from hospitals. Those assets would serve as the collateral for the loans made by Clearpath.[23] The series of JER loans started in 2008 and continued in 2010. The total amount of the JER loans made by Clearpath's investors was approximately $18,000,000.[24] Importantly, Mr. Churchville was unaware that this entire JER loan structure constituted a Ponzi scheme and was but a minor fraction of a much larger scheme operated by Rosenberg and his co-defendants in Maryland.[25]

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[22]Rosenberg was the sole owner of JER. Mr. Churchville had no ownership interest in JER, nor did he have any control over JER or Rosenberg, who was acting in concert with his co-defendants to defraud Mr. Churchville, Clearpath and Clearpath's investors.

[23] "ClearPath" as used here encompasses all of the ClearPath entities.

[24]See Exhibit A, at p. 3. As of this writing, the government and the defense continue working together to hone the numbers for the court. For the most part, the parties are in general agreement with the identity of investors and the amounts each invested in particular funds at issue in this case, although there is still significant disagreement on which investors sustained what amounts of net losses.

[25]The JER scheme perpetrated upon Mr. Churchville constituted less than ten percent (10%) of the total value of the charged Ponzi scheme in the Maryland case.

At some point in 2010, Mr. Churchville and his investors stopped receiving interest payments from JER. Rosenberg represented to Mr. Churchville that payments were not forthcoming because IPI (Shusterman) was not performing its role by liquidating the healthcare receivables it allegedly purchased from the hospitals. Money was generated only by IPI collecting from the debtor/patients who owed the hospital debt purchased by IPI/JER.

Although Mr. Churchville became suspicious of the Clearpath and JER relationship when payments ceased in 2010, Rosenberg continued to make misrepresentations to Mr. Churchville that the reason for the lack of payments was lack of performance on the part of IPI, which was charged with liquidating (collecting) the purchased healthcare receivables. Rosenberg suggested that they simply locate and substitute a new company to take the place of IPI to serve as the new healthcare bill collector.[26]

Before Mr. Churchville crossed the criminal line, he and his investors were clearly victims of the Maryland Ponzi scheme. Had Mr. Churchville come forward in late 2010 by reporting the losses to his investors and the SEC, he would not be standing before the court today for the charged RP scheme. Instead, Mr. Churchville elected to avoid the embarrassment of losing millions of dollars for investors (some of whom were family and friends) by engaging in what is known in this case as the RP scheme. Mr. Churchville chose to intentionally conceal the JER losses caused entirely by the criminal conduct of others, by entering into a different conspiracy with Rosenberg to create the entirely separate RP Ponzi scheme at issue here. Beginning in February of 2011, Mr. Churchville and Rosenberg engaged in a scheme to give the

[26]Rosenberg introduced Mr. Churchville to a potential liquidator known as AR Assist to possibly replace IPI. In a quest to recover Clearpath's investors' funds, Mr. Churchville located another healthcare receivable purchaser, Capio, which turned out to be the "real deal" and actually produced outlandish rates of return for Mr. Churchville and his investors. See footnote 33, below. While Rosenberg, Shusterman and company were scam artists who used health care receivables as the bait for their multiple schemes, Mr. Churchville's due diligence concerning potential returns for investors in healthcare receivables was well spent on Capio.

JER investors the appearance that the JER healthcare receivables were being liquidated in the ordinary course of business and representing to those investors that they were receiving payments from the liquidation of those files. In reality, no monies were being generated by liquidation of healthcare files since no one was liquidating any files and Shusterman was nowhere to be found. What Rosenberg and Mr. Churchville did instead was basically recycle money among the JER investors who, for the most part, turned over their (already lost and therefore) non-existent JER investment with another investment in RP.[27]

The critical point of the defense objection to the loss figures calculated in the PSR is that the government fails to recognize the fact that not all of the losses sustained in the RP scheme "resulted from the offense" committed by Mr. Churchville. Before delving into to the numerical minutiae, it is important for the court to look to the explanation of the term "Actual Loss" provided in the Application Notes to the Guidelines.

Application Note 3 provides, in part, as follows:

> 3. Loss Under Subsection (b)(1).—This application note applies to the determination of loss under (b)(1).
>
> (A)(i) Actual Loss—"Actual Loss" means the reasonably foreseeable pecuniary harm *that resulted from the offense*. (emphasis added)
>
> See U.S.S.G. §2B1.1(b) at Application Note 3(A)(i).

The clear and unambiguous language of the definition of "Actual Loss" provided under the guidelines is that the defendant's offense or his criminal conduct must be the cause of the pecuniary harm. It is not enough for the defendant to have committed some criminal offense to support some known amount; instead there must be a causal connection between the criminal offense and the "result[ing]" monetary harm.

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[27]RP denotes Receivable Partners, LLC, a New Jersey limited liability company owned entirely by Jonathan Rosenberg. The company was formed on July 23, 2010. Mr. Churchville had no ownership or control over RP. He did not know at this time that he and his investors were the victims of a Ponzi scheme. Mr. Churchville believed at the time that the JER losses sustained by his investors were the result of Shusterman not doing his job by collecting the purchased receivables. Rosenberg committed yet another fraud by convincing Mr. Churchville that they could recover monies on the purchased healthcare receivables. At this particular time, Mr. Churchville was unaware of Rosenberg's conspiracy with Shusterman and the other Maryland defendants.

In order to calculate the monetary loss "that resulted from [Mr. Churchville's] offense", the court must to go back to the point in time before Mr. Churchville crossed the criminal conduct line—the point when he was a "victim" in this case, not a criminal culprit. Had Mr. Churchville reported the JER Ponzi scheme, the JER investors would nevertheless have lost their investments because they were already gone. The original JER losses were approximately $14,331,186 and none of these losses would have been attributable to Mr. Churchville since he committed no criminal offense nor was he engaged in any scheme to defraud the JER investors. Therefore, any criminal losses associated with the RP scheme cannot include the losses that the JER investors would have suffered had Mr. Churchville reported the losses to his investors before engaging in his efforts to conceal his victimization in the Shusterman scheme.[28]

Unlike the PSR which reports the RP losses at $17,402,943[29], the defense maintains that the loss cannot be properly calculated without considering the following: first, the total RP investment, as shown in the attached Exhibit C[30] is $20,510,450.[31] Next, utilizing the corrected total RP investment, the defense calculation deducts the total amount of the original JER investments (minus Alpha and Epsilon)[32] since that amount would have been lost regardless of whether or not Mr. Churchville engaged in the RP scheme and cover up. This numerical calculation flows as follows:

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[28]Mr. Churchville did not cover up the JER losses because he himself was criminally responsible for them. Indeed, he had no specific knowledge of any criminal conduct by Rosenberg at that time. He concealed them because of the shame and embarrassment he would endure with his family, friends and investors. He was concerned about losing his ability to continue as an investment advisor and, most importantly, was trying to buy time to recover Clearpath's JER losses.

[29]PSR at ¶45.

[30]Exhibit C is submitted here in pdf format and reveals only the investment vehicles and amounts. The identities of the investors have been redacted for privacy reasons; however, the actual spreadsheet, in native format, has been provided separately to the court and the government.

[31]This figure is calculated on a separate spreadsheet submitted herewith as Exhibit C. The government initially advised Probation that this figure was $23,928,505.

RP Investment	$20,510,450
Original JER Investment	($14,331,186)
Net RP Investment	$ 6,179,264

Moreover, none of this accounts for the interim payments made by Clearpath to JER and RP investors. Those payments include:

RP Payments	$ 4,231,964
JER Cash Payments	$ 603,303
Total Payments	$ 4,835,267

The total loss associated with the RP scheme is therefore is calculated as follows:

Net RP Investment	$ 6,179,264
Total JER and RP Payments	($ 4,835,267)
Total RP Loss	$ 1,343,997

Before, calculating the total guideline loss amount associated with Mr. Churchville's offense conduct, one further adjustment is required. This involves a credit due the defendant against the losses for the $700,000 returned on a Capio investment purchased on or about January 1, 2012. These funds are currently held by the Receiver for the benefit of the

[32]The original JER investments were made in a series of investor loans separately identified by Greek alphabet letters. Prior to Mr. Churchville's efforts to conceal the Maryland losses, two JER loans, Alpha and Epsilon, had been paid in full. Therefore, in order to avoid double counting credits or losses in calculating the final loss number (for guidelines purposes)—which is exactly what the government is doing—the defendant is not applying a credit for the JER loans that were paid off in the ordinary course of business prior to Mr. Churchville's criminal conduct. Although the Alpha and Epsilon investors were paid full principal and interest, those investors were paid in the course of the Maryland Ponzi scheme, to which Mr. Churchville was not a party, and of which he was unaware, as he, too, was a victim of that scheme.

investors.[33] The guidelines expressly allow for credits against losses and the legal support for a $700,000 credit in this case is found at U.S.S.G. §2B1.1, Application Note 3(E) which states in pertinent part:

> Credits Against Loss.—Loss shall be reduced by the following:
> (i) The money returned, and the fair market value of the property returned and the services rendered, by the defendant or other persons acting jointly with the defendant, to the victim before the offense was detected. The time of detection of the offense is the earlier of (I the time the offense was discovered by a victim or government agency; or (II) the time the defendant knew or reasonably should have known that the offense was detected or about to be detected by a victim or government agency.
>
> (ii) In a case involving collateral pledged or otherwise provided by the defendant, the amount the victim has recovered at the time of sentencing from disposition of the collateral, or if the collateral has not been disposed of by that time, the fair market value of the collateral at the time of sentencing.

The RP scheme, while clearly a misguided attempt to conceal the JER losses, was also intended buy time to locate another company in the business of purchasing and liquidating

[33]The Information charges that Mr. Churchville represented to investors that the JER investments would "provide an approximate 30 percent rate of return over a period of sixteen months." See Information, at p. 3, ¶9. Mr. Churchville's due diligence into the healthcare receivable industry in general (not JER) as a fruitful investment for himself and his investors turned out (albeit too late) to be correct. For example, the $700,000 currently held by the Receiver in connection with a legitimate investment made by Mr. Churchville as part of the RP loans represents only a portion of the total return on this investment. Although the defendant is not privy to all of the source documents which should now be in the possession of the Receiver, he estimates that the total investment in Capio was approximately $1,531,245. The total assets purchased, with Capio as a partner, in the healthcare receivable files was $1,750,000. Mr. Churchville used a portion of the Commerce Bank line of credit (approximately $1,500,000) to invest with Capio as part of the RP investments. RP paid Capio $1,531,245, with Capio paying the difference for a total purchase price of $1,750,000. As of August 2014, the approximate amount collected in liquidating the purchased accounts receivable files was $9,192,854. Again, while Mr. Churchville is not privy to the final accounting from Capio, RP should have been paid its original principal ($1,531,245) plus a return of approximately $1,500,000. This represents a 100% return on investment. While IPI, Shusterman and Rosenberg had concocted a scheme that victimized Mr. Churchville and his investors (as well as many others), Mr. Churchville had found a legitimate and very profitable healthcare receivable liquidator (Capio), producing exceptional rates of return. Prior to the filing by the SEC of its civil enforcement action, Mr. Churchville continued to work with Capio through a separate vehicle (HCR Value Fund, LLC [HCR]), and his plan was to use his personal profits from HCR to repay RP and other investors. The SEC action curtailed that effort.

healthcare receivables to return money back to the defendant's investors. Well before his crime was detected, Mr. Churchville found Capio and profitably invested $1.5 million there.[34]

As a result, the total guideline loss is composed of four elements as follows:

OPCO Loss	$2,500,000
FOK Loss	$3,500,000
RP Loss	$1,343,997
Capio Credit	($ 700,000)
Total Loss	$6,643,997[35]

Thus, for Guideline purposes, the base offense level of seven (7) must be adjusted upward eighteen (18) levels for the amount of loss under U.S.S.G. §2B1.1(b)(1)(J), as opposed to the twenty-two (22) level increase proposed in the PSR at ¶45.

b. The Law

The loss amount must be determined in the context and with the guidance of the First Circuit's opinion in United States v. Alphas, 785 F.3d 775 (1st Cir. 2015). The significance of that decision to this case cannot be overstated.

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[34]This $1.5 million investment came from a line of credit ClearPath had with Commerce Bank, secured by the FOK investments (although the actual monies flowed through another RP investment vehicle). Regardless of how the court ultimately determines the distribution of the Capio profits for restitution purposes, the $700,000 should be applied as a credit against the guideline loss amount.

[35]The PSR also attributes "$2,171,327.97 in 'fees' he [Mr. Churchville] collected in connection with Receivable Partners, and $260,000 in fees he took during the house scheme." PSR at ¶45. The defendant disputes these loss figures for a number of reasons. First, the $2,171,327.97 in "fees" claimed to be connected to the RP scheme is grossly inaccurate. The PSR relies upon Attachment B to the government's reply to the defendant's PSR objections. While mathematically the figures in Attachment B total $2,171,327.97, the amounts are not in any way connected to the claimed amounts paid to Mr. Churchville in the RP scheme. Mr. Churchville was not paid $2.17 million fees in connection with the charged conduct; most of these payments represent fees paid to Mr. Churchville from other investments not connected to any criminal conduct charged in this case, and therefore have no bearing on the guideline loss calculation. To the extent any portion of the fees was charged in connection with the RP conduct, those fees (which are approximately $400,000) are already included in the gross total RP investment of $20,425,477 as shown here in defendant's Exhibit C. Mr. Churchville's loss calculation properly takes into account all of the factors required to arrive at both accurate guideline loss and restitution amounts. As to the $260,000 "fee" attributed to the house scheme, there has been no information as to where this figure comes from and it has not been established by any evidence provided to the defense (or, as far as counsel know, to Probation).

Alphas was an insurance fraud case in which the defendant based his objection to the PSR's loss calculation on the difference between the face amount of the insurance claims (the PSR's [and the government's] yardstick) and the (significantly lower) amount by which the claims were inflated, reasoning that the victim insurance company would have paid the uninflated portion of the claim in any event.[36] The First Circuit agreed with the defendant, specifically finding, inter alia, that the measure of loss (actual or intended) was controlled by the defendant's conduct. 785 F.3d at 782. In Alphas, the loss caused by the defendant's conduct was cabined by the extent to which the insurance company paid losses it would not have otherwise paid (i.e., the inflated portion of the claims). Here, the loss attributable to the defendant's offense conduct excludes losses that resulted from the conduct of others in the Maryland case, or amounts that were repaid to investors while managing those investments.[37] Alphas reminds us that the First Circuit has "eschewed rigid rules and instead taken 'a pragmatic, fact-specific approach' to loss calculation." 785 F.3d at 781, quoting United States v. Prange, 771 F.3d 17, 35 (1st Cir. 2014). This is described as the "degree-of-culpability approach" to loss calculation, and mandates a distinction between a "fraudster" who creates a false claim out of whole cloth and one who enhances an otherwise legitimate claim by fabricated inflation. Id. Given the facts and travel of the Maryland case, we now know that the losses caused by Shusterman and his cronies had clearly already occurred before Mr. Churchville's criminal conduct. Mr. Churchville's efforts to conceal those losses while he attempted to recover them, no matter how misguided (and even illegal), did not cause those losses. While they may have

[36]The resulting guideline adjustment differential in Alphas was, as here, 4 levels. 785 F.3d at 778-79.

[37]These considerations are important to arriving at a reasonable sentence. See, e.g., United States v. Barlow, 143 Fed.Appx. 965, 968 (10th Cir. 2005).

occurred on Mr. Churchville's watch as an investment advisor with ClearPath, and while the economic ramifications to the victims are very real, they were not the result of the offense conduct at issue here.[38] In short, more than $14 million in investor losses would have occurred regardless of what Mr. Churchville did after the fact.

The court in Alphas brings its considerable weight to bear on the issue presented here. "This gets to the heart of the matter. Under the sentencing guidelines, loss generally does not include sums that a victim would have paid to the defendant absent the fraud." 785 F.3d at 781, citing United States v. Evans, 155 F.3d 245, 253 (3d Cir. 1998); United States v. Parsons, 109 F.3d 1002, 1004 (4th Cir. 1997); and United States v. Miller, 316 F.3d 495, 498-99 (4th Cir. 2003). As the court noted, "[t]he guidelines are designed to ensure that the sentence imposed on a defendant 'reflect[s] the nature and magnitude of the loss caused or intended by [his] crimes.'" 785 F.3d at 782 (emphasis supplied). See also, 785 F.3d at 783. "[L]oss is meant to serve as a proxy for the seriousness of the crime and the relative culpability of the offender. The best way to gauge the seriousness of a fraud offense is to determine how much the fraudster set out to swindle – and no fraudster sets out to swindle sums that would have been paid anyway. That is also the best way to gauge a fraudster's culpability." 785 F.3d at 783.

Here the defendant never set out to cause any losses.[39] Instead, he set out to recover losses that had already occurred at the hands of others, without his knowledge or participation (and as such would have occurred in any event), and to conceal those losses while the recovery was in process.[40] It was the later recycling of investor funds based on misrepresentations and without the knowledge of the victims that resulted in the additional losses which were not part of those Mr. Churchville caused. See also, United States v. Reda, 787 F.3d 625, 631-632 (1st Cir. 2015). In Reda, the district court included in the fraud scheme loss calculation not only the amount of the kickback paid to the undercover agent, but also the price paid for the restricted stock that was the subject of the fraud.[41] The defendant sought a reduction in the loss calculation for the actual value of the stock. The court agreed and remanded for a determination of that value and its subtraction from the loss calculation. Here, the pre-existing losses from the Maryland case should likewise be excluded from the guideline calculation. Cf., United States v. Iwuala, 789 F.3d 1, 12-14 (1st Cir. 2015).[42]

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[38] Alphas also makes the civil/criminal distinction in its loss analysis. See, 785 F.3d at 781-82.

[39] See, e.g., United States v. McQueen, 2006 WL 3206150, *6 (04/20/06)(Hamilton, J.)

[40] See, e.g., United States v. Milne, 384 F.Supp.2d 1309, 1311-12 (E.D.Wis. 2005).

While some considerable effort has gone into the analysis and determination of the guideline range as set by the loss calculation, it should not be overlooked that the court may simply adjust the range because it overstates the defendant's culpability and bears no reasonable relationship to crafting an appropriate sentence.[43] As Judge Gertner said in United States v. Mueffelman, 400 F.Supp.2d 368, 371 (D.Mass. 2005), "[i]n sentencing Mueffelman, I discounted the Guideline sentencing range three levels because I found that the amount of loss did not serve as a fair proxy for Mueffelman's culpability. The sentencing range that resulted from that adjustment was more in keeping with Mueffelman's culpability and the purposes of sentencing."[44] On the question of loss in general and its relationship to guideline sentencing, Judge Gertner made the following observation, particularly apt here:

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[41]Reda involved the same fraud scheme at issue in United States v. Prange, 771 F.3d 17 (1st Cir. 2014).

[42]The defendant here is seeking a justifiable, non-Guideline sentence. As the court noted in United States v. McQueen, supra, 2006 WL 3206150, *5 at n. 1:

> It may not always be necessary to reach a definitive finding as to all guideline issues in every case. As Judge Newman explained for the Second Circuit in *United States v. Crosby*, 397 F.3d 103, 112 (2d Cir.2005), abrogated on other grounds by *United States v. Fagans*, 406 F.3d 138 (2d Cir.2005), precise determinations may not be necessary in some complex matters, such as loss calculations or the precise scope of departures authorized by the Guidelines, at least where the sentencing judge has considered these issues and has fairly decided to impose a non-Guidelines sentence.

[43]Many courts believe that the loss guideline is "fundamentally flawed." See, e.g., United States v. Corsey, 723 F.3d 366, 377-382 (2d Cir. 2013)(Underhill, J., concurring).

> The amount of loss that a given crime has engendered is surely one measure of the seriousness of the offense. Sometimes loss is an entirely appropriate proxy for culpability. At other times, it is not. All other things being equal, one who causes a greater loss as a result of his or her illegal acts is more culpable than one who causes a lesser loss. But, as Judge Lynch noted in *United States v. Emmenegger,* 329 F.Supp.2d 416, 427 (S.D.N.Y.2004), "[i]n many cases ... the amount stolen is a relatively weak indicator of the moral seriousness of the offense or the need for deterrence." Loss may well be a kind of accident, depending on the fortuities of law enforcement or even the market, as much as the defendant's culpability.

400 F.Supp.2d at 373.[45]

An important consideration in this loss/proxy dichotomy is whether the defendant set out to steal money—that is, whether the vehicle he used was created as a sham in the first instance and it was his intent to do nothing but line his pockets from the start—or whether the business was legitimate but the circumstances, admittedly put in motion by the defendant, overpowered the vehicle. See, Mueffelman, 400 F.Supp.2d at 373.

2. Guideline Enhancements

Mr. Churchville has not objected to the other guideline enhancements suggested by the probation officer (PSR at ¶60) as they are required by application of the guidelines to this case.[46]

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[44]Mueffelman was a sentencing proceeding conducted after Blakeley v. Washington, 542 U.S. 296 (2004) but which anticipated United States v. Booker, 543 U.S. 220 (2005).

[45]Mueffelman also notes that even under pre-Booker guideline law, the court could depart downward if the computed loss overstated the defendant's culpability. 400 F.Supp.2d at 377-78, citing cases. Although the monetary amount of the loss was less in Mueffelman than it is here, there were over 300 victims in that case. Id., at 377.

[46]See footnote 11, above.

B. The Other Statutory Factors

Having first performed the calculation required by 18 U.S.C. §3553(a)(4)(A) to establish the GSR[47], we turn to the statute's other considerations.

1. Nature and circumstances of the offense and history and characteristics of the defendant[48]

a. Offense Facts

As noted earlier, a statement of the facts underlying the plea agreement (Exhibit A) provided the factual predicate required for the defendant's change of plea. Those facts are supplemented here by the description of the methodology used to calculate the guideline loss (see Section II.B.1 above). There is no need to repeat them here.

b. The Maryland Case

The genesis of this case is the colossal swindle perpetrated by the defendants in the Maryland prosecution.[49] The background of that scheme as it relates to Mr. Churchville's position in his own case, and to the losses sustained by his investors, has been explicated above and need not be repeated.[50] Suffice it to say that some of the victims in this case were harmed by two separate events of criminal conduct, one the actions of the defendants in the Maryland case, and the other perpetrated by Mr. Churchville. Despite the staggering totality of the victim losses, punishment for those events must likewise be separated.

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[47]The First Circuit has often noted that this step must be taken first. See, e.g., United States v. Jiménez-Beltre, 440 F.3d 514, 518 (1st Cir. 2006) (en banc), cert.denied, 549 U.S. 1118 (2007); United States v. Dávila-González, 595 F.3d 42, 46-47 (2010), quoting United States v. Pelletier, 469 F.3d 194, 203 (1st Cir. 2006)(citing Jiménez-Beltre.

[48]18 U.S.C. §3553(a)(4)(A).

[49]See Exhibit B-1 (the Shusterman Indictment). See also, footnote 5, above.

[50]See Section II.A.1; see also footnote 5, above, and the Exhibits referenced there.

c. **Background**

Mr. Churchville's background is generally set forth in Part C of the PSR. However, a few additional facts are worth noting.

Although his employment history as reflected in the PSR goes back only to his days at Wachovia, Mr. Churchville has been in the financial services industry almost all his working life, beginning in New York with Oppenheimer in 1992. After 5 years there, he went on to Paine Webber and then, still in New York, on to Wachovia 5 years after that. He learned about investments and financial services from the ground up. When Wachovia purchased First Union and decided to take their investment arm in a different direction, Mr. Churchville found himself at the Providence office of Morgan Stanley in 2004. By 2008, with a store of knowledge amassed in the previous 16 years, which now included private equity expertise, he went off on his own and established ClearPath. Although not entirely clear at the time, this endeavor was about to get caught in the whipsaw that became the financial crisis.

Mr. Churchville first married in 1997, and he and his wife had their first of two children in 2000. The second was born in 2003. But the marriage was not destined to survive what came as shock and betrayal when Wachovia decided to readjust its investment management operations and Mr. Churchville essentially had to begin again at Morgan Stanley. While the ensuing divorce was not easy, his co-parenting relationship with his former wife remains amicable and strong, although the toll this case has taken on his children is unable to be measured.[51]

Meanwhile, what Mr. Churchville thought was ClearPath's bright future was suffering from difficulties he would not even know it had for several years to come. Aside from the

[51]The court has (already or prior to sentencing will have) received several letters of support from Mr. Churchville's family members and friends.

duplicity of Jonathan Rosenberg, and what eventually became the Maryland Ponzi scheme, there were certain failures of professional service that caused enormous legal problems for ClearPath, and their discovery is now the subject of efforts by the court-appointed Receiver for ClearPath to seek redress for those failings in an effort to recover assets which may be used for restitution.

For his part, as has been described above in excruciating detail, Mr. Churchville, when he learned of the shocking and complete failure of the JER investments, was overwhelmed with fear and uncertainty. He was at once embarrassed and frightened, and foolishly thought that if he could conceal the JER debacle from Clearpath's investors, he could have time to recover the funds through other investment vehicles, make good on the losses, avoid the shame and humiliation of this calamity, protect his status as an investment adviser, and thereby live to fight another day. He was utterly wrong.

Obviously, hindsight is 20/20. Had he known what he was inviting by becoming an adversary of the United States in the devastating environment known as the criminal Justice system, he would certainly have done things differently. Despite the shame and embarrassment, and the millions of dollars in losses, he would have told his investors the truth. He (or one of his investors) would likely have received some legal advice to alert the SEC or other regulatory authorities to what had occurred. He would undoubtedly have been the subject of a plethora of lawsuits over the ClearPath losses, and would probably have been finished as an investment advisor. All this is now a small price to pay. As it happens, all of those maladies have now befallen him anyway, but with the added feature of now facing years in prison.

But as Mr. Churchville stands before the court to accept his punishment, it is important to recognize that, unlike so many others who have gone before him into sentencing proceedings, he did not set out to financially injure anyone (or to bring this misfortune on himself or his family).

He is not an evil financial mastermind who started his company as part of a brazen scheme to defraud investors. He is an essentially decent and good-hearted person of moderate intelligence, who found himself in a horrible situation that, no matter what he did, was going to cause massive losses for his investors.

d. Motivation

One of the characteristics of the defendant—and a factor to be considered in sentencing—is whatever motivated the offense conduct. Wisconsin v. Mitchell, 508 U.S. 476, 486 (1993). This is also an element of the §3553(a) analysis.[52] See, e.g., United States v. Ranum, 353 F.Supp.2d 984, 990 (E.D.Wis. 2005).[53] In this case, the motive is atypical. Unlike most economic crime cases, the incentive here was not greed.[54] It was fear. Fear of embarrassment; fear of shame and humiliation; fear of having to explain to people who trusted him that enormous amounts of the money had been irretrievably lost; fear of being buried by professional liability litigation, and ultimately losing his ability to act as a financial advisor and never again being able to work in the financial services industry; fear of having to start over from scratch in some new and completely unfamiliar employment arena, with no contacts and no experience. And fear of this kind usually spawns creative, but irresponsible, remedies. And so it was here. The creation of what has become known as the RP Ponzi scheme was, like many ideas of its ilk, destined to fail from the beginning but seemed like a good idea at the time. It is now up to the court to evaluate the conduct, the damage, and most importantly, the person. The defendant cannot be judged outside of the circumstances that bring him to judgment in the first place. Sentencing serves many purposes, but its goal must always be singular—to be fair.

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[52]"Indeed, one significant difference between the mandatory and advisory regimes [of the Sentencing Guidelines] is the court's ability to consider motive." United States v. Salazar-Hernandez, 431 F.Supp.2d 931, 935 (E.D.Wis. 2006).

[53]Ranum is in many ways a case similar to this one. Mr. Ranum was a senior loan officer at a bank. He had limited lending authority and certain loan reporting requirements. He issued a standby letter of credit in the original amount of $190,000 to two borrowers. This action was both in excess of his lending authority and in derogation of his reporting requirements. Based on borrower requests to finance its fledgling business, Ranum continued to make loans to the borrowers, without the required approvals or reporting, which ultimately ballooned to over a million dollars. Ranum never intended to harm the bank; he was making additional extensions of credit in order to help the borrowers' business venture succeed so that it could repay the earlier loans. The court found that his culpability was mitigated because he did not act for personal gain or that of another. It also found that the business venture had a chance of success, and Ranum's faith in it was not entirely unreasonable. The circumstances were unusual, and the court made the following observation:

> Defendant's offense level under the advisory guidelines was largely the product of the loss amount. One of the primary limitations of the guidelines, particularly in white-collar cases, is their mechanical correlation between loss and offense level. For example, the guidelines treat a person who steals $100,000 to finance a lavish lifestyle the same as someone who steals the same amount to pay for an operation for a sick child. It is true that, as the government argued in the present case, from the victim's perspective the loss is the same no matter why it occurred. But from the standpoint of personal culpability, there is a significant difference. *See United States v. Emmenegger,* 329 F.Supp.2d 416, 427-28 (S.D.N.Y.2004) ("Were less emphasis placed on the overly-rigid loss table, the identification of different types of fraud or theft offenses of greater or lesser moral culpability or danger to society would perhaps assume greater significance in assessing the seriousness of different frauds."). In the present case, defendant did not act for personal gain. He made loans outside his authority and was reckless with his employer's money. But that is not the same as stealing it. Thus, due to the nature of the case, I found the guideline range, which depended so heavily on the loss amount, greater than necessary.

Ranum, 353 F.Supp.2d at 990 (footnote omitted).

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[54]See, United States v. Milne, supra, 384 F.Supp.2d at 1310-11:

> To his credit, though, defendant voluntarily reported his misconduct and cooperated with the bank in attempting to repay his debt. The bank was able to seize and sell the remainder of defendant's fleet for about $36,000. Defendant then essentially emptied his pockets, including turning over every cent of equity he had in his house (about $38,000) to try to make good on his obligation. Finally, defendant did not take the bank's money out of greed or a desire to live a lavish lifestyle; rather, he misguidedly tried to keep a sinking business afloat.

See also, United States v. Ranum, supra, 353 F.Supp.2d at 990. In a fairly recent case in this court, Judge McConnell focused on this issue during sentencing. He noted that he was unable to discern any motive for the defendant's conduct other than greed. See, United States v. Delfarno, 1:14-cr-139-M, Transcript of Sentencing, October 28, 2015, ECF Document 27, at pp. 16.

2. Punishment, [Individual] Deterrence and Rehabilitation[55]

a. Protecting the public from the defendant[56]**and rehabilitation**[57]

These sentencing considerations are not applicable in this case. It is not reasonably likely that Mr. Churchville, who has no previous criminal history, and who has now experienced the power of the court, will ever commit another offense. Thus, individual deterrence is not an issue in this case. It is also unlikely that the federal prison system will provide any rehabilitation or other needed services to this defendant. Those factors are therefore not addressed here.

b. [General] Deterrence[58]**, reflecting seriousness of the offense, promoting respect for the law, and imposing just punishment**[59]

As to deterrence, while the sentence in this case may provide some measure of deterrence to others similarly situated, the court should recognize that (a) the motivation for the offense conduct does not necessarily lend itself to deterring others unless they have the same motivation.[60] Going to prison because one tried to conceal a loss of investor funds caused by others while simultaneously attempting to recover them will likely have little deterrent effect on someone who intends and attempts (successfully or not) from the get go to convert investor funds to his/her own use; and (b) the statute refers to "adequate" deterrence. No individual sentence in any case will provide "adequate [general] deterrence", assuming "adequate deterrence" deterrence means to permanently deter everyone from committing economic crimes.[61]

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[55] 18 U.S.C. §3553(a)(2).

[56] 18 U.S.C. §3553(a)(2)(C).

[57] 18 U.S.C. §3553(a)(2)(D).

[58] 18 U.S.C. §3553(a)(2)(B).

[59] 18 U.S.C. §3553(a)(2)(A).

[60] See, United States v. Dikiara, 50 F.Supp.3d 1029, 1032 (E.D.Wis. 2014):

> The parties debated the extent to which a prison sentence would serve the purpose of general deterrence. The Sentencing Commission addressed general deterrence in this context in originally adopting the guidelines, noting that in the pre-guideline era many defendants convicted of fraud or embezzlement received probationary sentences. The Commission endorsed at least a short period of imprisonment in these cases, concluding that the definite prospect of prison, even though the term may be short, would serve as a significant deterrent. United States Sentencing Commission, *Guidelines Manual* ch. 1, pt. A, 4(d). However, the concept of general deterrence "depends on potential offenders' rational assessment of the likely costs and benefits of crime." *United States v. Bannister*, 786 F.Supp.2d 617, 660 (E.D.N.Y.2011).

3. Available Sentences[62]

There are generally in these circumstances no sentences available which present an alternative to a regular adult prison sentence, the court may consider combining all the available sentencing components—incarceration, halfway house, home confinement, and community service—to fashion an appropriate sentence here. Such a composite sentence—in the defense view, "sufficient but not greater than necessary" to achieve the goals of sentencing in this particularly unusual case, may also assist the Receiver in his efforts to recover additional assets.

4. Sentencing Disparity[63]

Probably the most important factor to consider in this sentencing is the avoidance of sentencing disparity.[64] It is particularly significant in this case because the guideline range (regardless of which loss figure is used) is disproportionate to both the offense conduct and to other sentences in related and similar cases. This is especially ironic because one of the principal reasons for the original enactment of the guidelines was to minimize sentencing disparity.[65] There are two areas of sentencing disparity the defendant asks the court to consider here.

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[61] To some degree, the value of deterrence to others derives from conveying an accurate assessment of the conduct for which the sentenced defendant is being held responsible. See, e.g., Alphas, 785 F.3d at 781.

[62] 18 U.S.C. §3553(a)(3).

[63] 18 U.S.C. §3553(a)(6). See also, United States v. Panice, 598 F.3d 426, 441-443 (7th Cir. 2010)(case remanded for resentencing because court assumed reasonableness of a 360-month guideline sentence and failed to adequately consider sentencing disparity, discussing comparative sentences of defendants such as Skilling, Ebbers and the Rigas brothers.

[64] This is not to suggest in any way that the loss calculation itself is not almost equally important because, among other things, it sets the guideline range in the first place. Using even the defendant's loss calculation, however, does not fully resolve the disparity issue.

a. Related Cases

The events prefatory to the defendant's criminal conduct were themselves the basis for the conviction of four individuals in the District of Maryland.[66] As noted above (in footnote 5), Kuber, Feldman and Rosenberg each pled guilty and cooperated with the government. According to their respective plea agreements, each stipulated to loss calculations significantly greater than the highest losses suggested (whether in the PSR or separately by the government) here.[67] In addition, whether viewing the Maryland case as related to Mr. Churchville's case or as another, similar wire fraud case with a similar scheme and similar methodology, the potential disparity is staggering.

First, assuming the PSR, in its entirety, is accepted by the court, Mr. Churchville's GSR will be 188-235 months. Notably, that range embraces the sentence that Shusterman received in the Maryland case, after a 22-day trial proving beyond a reasonable doubt that he engineered a massive Ponzi scheme which caused investor losses of over $240 million dollars. On the other hand, Kuber and Feldman, both of whom (according to the Maryland Indictment [Exhibit B-1] and their individual Informations and agreed statements of facts [Exhibits B-2 and B-3 (Kuber)

[65]See, Barrineau v. United States, 2011 WL 112502, *5 (D.S.C. 01/13/11)(Norton, J.); see also, United States v. Booker, 543 U.S. 220, 295 n. 14 (2005). Avoiding national sentencing disparity is also an objective of 18 U.S.C. §3553(a)(6). United States v. Reyes-Rivera, 812 F.3d 79, 1449 (1st Cir. 2016), quoting United States v. Marceau, 554 F.3d 24, 33 (1st Cir. 2009).

[66]The PSR indicates that cases of the Maryland defendants are related (PSR at ¶¶7-11). Although prosecuted outside this District, the Maryland case was the genesis of the charges brought here.

[67]In Kuber's case, he stipulated to a loss adjustment of 24 levels, representing an amount between $50 million and $100 million dollars. Feldman stipulated to a 26-level increase, representing a loss of between $100 million and $200 million dollars. Rosenberg, who was the beneficiary of recent changes in the guidelines, stipulated to an adjustment of 24 levels, representing a loss of between $65 million and $150 million dollars.

and Exhibits B-5 and B-6 (Feldman)] participated extensively in the Shusterman scheme, and stipulated to losses between double and quadruple what Mr. Churchville is alleged (in the PSR) to have caused, received sentences of 4 years or less. Even Rosenberg, who did not begin to cooperate until after he had been indicted and when he was faced with trial, and who stipulated to a loss figure between 3 and 6 times Mr. Churchville's, received a sentence of 5 years.

We recognize, of course, that all these individuals cooperated against Shusterman, some earlier than others. But Mr. Churchville had no opportunity to cooperate against anyone, nor was he ever asked by the government to do so. In fact, defense counsel offered his cooperation to the government early on but was told that there was no occasion for it.[68] Since "cooperation" in the context of U.S.S.G. §5K1.1 was not available here, Mr. Churchville nevertheless has cooperated extensively with the Receiver in efforts to recover—even by clawback—funds that could become available for restitution.[69]

Second, the (now indisputable) facts of the Maryland case—gleaned from the statements of facts attached to the plea agreements of Kuber, Feldman and Rosenberg—paint a picture of a fraud that is breathtaking. In fact, their scheme is so disproportionate to the conduct alleged against Mr. Churchville, that when their sentences—whether warranted by cooperation or not—are juxtaposed with what the guidelines call for here, the resulting disparity is overwhelming.[70]

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[68]Mr. Churchville, as a victim himself and a representative of his ClearPath investors, had already appeared and testified as a grand jury witness in the Maryland investigation.

[69]The Receiver has previously apprised the court of the manner and extent of Mr. Churchville's cooperation, its value to his efforts, and how much he has thus far been able to recover towards restitution with the defendant's assistance. The court is also aware that there are further such efforts continuing, although their results will not be known soon enough to impact the sentencing.

[70]As noted above, Shusterman and Rosenberg were indicted and charged (in Count 1) with a wire fraud conspiracy and (in Counts 2 through 10) multiple substantive wire frauds. See Exhibit B-1. Feldman, who was originally Shusterman's partner (Kuber having been Rosenberg's partner), pled to a one-count Information (Exhibit B-6) charging only wire fraud conspiracy. But the recitation of the conspiracy was nearly identical to the conspiracy count of Shusterman's indictment.

Third, there is no suggestion that, excepting the purchase of the Barrington residence, Mr. Churchville used investor funds for his benefit. The defendants in the Maryland case expended substantial monies on themselves, and in addition to forfeiture orders for all the investor money they stole, they were collectively ordered to forfeit to the United States a winter home in Florida, a boat, a Rolls Royce, and a condominium in Philadelphia.

In short, when viewed—as it should be—in the larger context of the case from which this one sprang, it is impossible, within the parameters of fundamental fairness, to justify a guideline sentence here.

b. Similar local cases

It is also helpful to look at sentences from our district court in similar cases which demonstrate the potential for severe sentencing disparity here.[71] At the outset, we note that the defendant is acutely aware that sentencing is, at bottom, an individualized exercise[72], and that the sentences referenced below were imposed in consideration of some factors known only to the court. Nevertheless, the comparisons are important in many other contexts, such as fundamental fairness, public perception, and general deterrence.

There have been several widely publicized, large-scale fraud prosecutions of recent vintage, all resulting in sentences substantially below the GSR calculated by probation and adopted by the government for this case. In one, a multi-defendant government benefit theft case, involved an extensive and broad-based multi-million-dollar SNAP benefit fraud. All the defendants pled guilty to various charges including conspiracy, wire fraud, government benefit

[71]In addition to statutory disparity considerations [18 U.S.C. §3553(a)(6)], ". . . a district court in its discretion may consider local disparities to be relevant. . ." United States v. Rochon, 318 Fed.Appx. 395, 398 (6th Cir. 2009).

[72]After all, this Memorandum is itself the embodiment of that effort.

theft, and money laundering. The highest sentence in that case was 36 months' incarceration and a $2 million restitution order.[73] In another, the defendant pled guilty to multiple counts of filing false tax returns, wire and tax fraud, theft of government funds, forgery, and aggravated identity theft, in a large-scale scheme to prepare and file false tax returns for others. The court imposed a sentence of 36 months' incarceration, which included a mandatory 24 months for the aggravated identity theft counts over which the court had no discretion, along with a restitution order for $1 million to the Internal Revenue Service.[74] Other fraud cases in which the defendants pled guilty included one in which the court imposed a sentence of 24 months for wire fraud and obstruction of the IRS in a payroll service scheme[75], and another in which the defendant received a sentence of 39 months (also including a mandatory 24 months for aggravated identity theft), in a mail fraud case involving stolen securities, money laundering, and filing false tax returns.[76]

In a case similar in some respects to this one, involving a single-victim investment Ponzi scheme in which the defendant pled guilty to mail and tax fraud, the Judge McConnell imposed a sentence of 5 years' probation and ordered restitution of $10 million.[77] While there have been numerous other cases before the court in the last several years, two others bear mention.

In one, the defendant pled guilty to multiple charges in a massive fraud scheme concerning theft of government property from the United States Navy. The overall investigation and prosecution ensnared other defendants, resulted in the closure of at least one local business and the loss of many jobs, and embraced a fraud of epic proportions involving tens of millions of

[73] United States v. Al Kabouni, 1:13-cr-119-L.

[74] United States v. Guzman, 1:16-034-S.

[75] United States v. Hebert, 1:14-085-S.

[76] United States v. Hurst, 1:12-162-S.

[77] United States v. Feibish, 1:12-cr-028-M

dollars, for which the defendant, while pleading guilty, refused to accept responsibility. There, the court imposed a prison sentence of 10 years and a restitution order of $18 million.[78] The scope of the criminal conduct in Mr. Churchville's case pales in comparison.

The other noteworthy case was one in which the defendant pled guilty to conspiracy and wire fraud charges in a complex and far-reaching insurance fraud case in which he illegally used the identities of terminally ill individuals to purchase millions of dollars in annuities.[79] The defendant then attempted to withdraw his guilty plea, resulting in a 4-day evidentiary hearing during which the court found that the defendant perjured himself in his attempt to perpetrate yet another fraud, this time on the court, designed to vitiate his plea.[80] Moreover, the Guideline Sentencing Range in that case was life in prison. The court imposed a sentence of 72 months' incarceration, and, after another 4-day evidentiary hearing before Magistrate Judge Sullivan, ordered the payment of $46 million in restitution.

In viewing sentencing disparity, the court may also consider cases in which there are other, more aggravating factors in play, although they are not present in this case, because the sentences imposed were more lenient despite the conduct's being more egregious. For example, in two wire fraud cases in this district, one a trial conviction and the other a guilty plea, both offenses were committed in the context of fraudulent insurance claims. The distinguishing—and aggravating factor—is that in both cases the insurance claim was the result of an arson—obviously a far more serious and dangerous activity than anything that occurred here, although the sentencing crime was an economic one. The defendant who pled guilty was sentenced to 42

[78]United States v. Mariano, 1:12-061-L.

[79]United States v. Caramadre, 1:11-186-S.

[80]This travesty has been described in excruciating detail in this court's decision in United States v. Caramadre, 957 F.Supp.2d 160 (D.R.I. 2013), aff'd., 807 F.3d 359 (1st Cir. 2016), cert.denied, 2016 WL 1545250 (2016).

months in prison.[81] The defendant convicted after trial received 78 months.[82] Both of those sentences were well below the guidelines calculated for this case (as well as those for the cases in which they were imposed); and both involved conduct so much more egregious as to make any comparison here almost ludicrous.[83]

5. Restitution[84]

The PSR indicates that the government has provided probation with a restitution amount of $23,402,943.27.[85] Despite the various challenges posed by the voluminous records, the defense has calculated a different, and substantially less, proposed restitution figure.[86]

The statutory scheme created by Congress which authorizes the imposition of a restitution order is governed by Title 18 U.S.C. § 3663(a) which provides in relevant part:

> (1)(B)(i) The court, in determining whether to order restitution under this section, shall consider--
>
> (I) the amount of the loss sustained by each victim as a result of the offense; and . . . (emphasis added)

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[81] United States v. Metellus, 1:14-103-M.

[82] United States v. Karmue, 1:13-179-S.

[83] One of the factors driving this sentencing is how vocal the victims have been in their effort to see the defendant severely punished. Defense counsel do not in any way denigrate their positions or eschew their losses. The economic ramifications to them are real. They have been relentless in their quest for punishment and clearly seek to thereby influence the court's decision in that direction. The court has seen this kind of pressure before, and successfully separated the wheat from the chaff. See, Doe v. Brown University, 2016 WL 5409241, *1 (D.R.I. 09/28/2016)(Smith, C.J.).

While defense counsel also try to influence the court's thinking for the benefit of the defendant, what we ask of the court—separate from our expected advocacy—is to bear in mind that, as Alphas teaches, sentencing in economic loss cases is not governed only by what happened to the victims. It is instead governed by the extent to which the court can supportably find that whatever happened to the victim was caused by the defendant's criminal conduct. In nonviolent crime cases, those are almost invariably two very different things.

[84] 18 U.S.C. §3553(a)(7).

[85] PSR at ¶111, and Addendum to PSR, at No. 2.

[86] The methodology for the defense calculation is more thoroughly described in the analysis of the loss figure. See Section II.A., above.

> (ii) To the extent that the court determines that the complication and prolongation of the sentencing process resulting from the fashioning of an order of restitution under this section outweighs the need to provide restitution to any victims, the court may decline to make such an order.
>
> (2) For the purposes of this section, the term "victim" means a person directly and proximately harmed as a result of the commission of an offense for which restitution may be ordered including, in the case of an offense that involves as an element a scheme, conspiracy, or pattern of criminal activity, any person directly harmed by the defendant's criminal conduct in the course of the scheme, conspiracy, or pattern. (emphasis added)

As Section 3663(a)(1)(B)(i) plainly states, restitution is to be determined by "the amount of the loss sustained by each victim *as a result of the offense.*"[87] The statute defines the term "victim" as the person who was "*directly and proximately harmed as a result of the commission of an offense*." 18 U.S.C. § 3663(a)(2). Regardless of which guideline loss figure the court adopts, the amount of restitution should be $6,643,997.

While at first blush, the payment of restitution would not seem to be an achievable goal in this case, it may be after all. A non-guideline sentence and calculation of a $6.6 million restitution figure, considered in light of the assets already recovered by the Receiver and those still recoverable, particularly if the defendant continues to assist him, may significantly change the restitution calculus.[88]

[87]This language tracks the definition of "actual loss" found in U.S.S.G. §2B1.1(b) at Application Note 3.

[88]See also, Section II.D., below.

D. Cooperation

As noted above (see footnote 1), Mr. Churchville has been cooperating with the court-appointed Receiver in his efforts to recover moneys to be used toward restitution.[89] This has been an intense effort, and the Receiver has coordinated his activities with the SEC. While the Receiver has made reports of his activities to the court, it is helpful to briefly identify here the areas in which the defendant has been of assistance to that effort. Either before the appointment of the Receiver, or in conjunction with the Receiver's efforts, and in certain instances at the Receiver's request, Mr. Churchville pushed through the December 2014 $1,400,000 Hastings distribution; through his counsel, voluntarily turned over nearly $1,000,000 of cash to the Receiver; cooperated fully with the liquidation of personal assets, including his parents' home (a condominium purchased in 2005); assisted in the segregation and recovery of $700,000 from an investment held by Receivable Partners; assisted in the liquidation of the HCR Value Fund

[89]Mr. Churchville, with the assistance of his attorneys, has been cooperating with the Receiver in an attempt to maximize the value of the Receivership Estate which includes clawing back ill-gotten gains from investors, professionals and other responsible third parties. For example, Mr. Churchville and his attorneys have asked the Receiver to investigate whether Jonathan Rosenberg's ("Rosenberg") parents are truly victims in this JER and RP scheme. As the evidence shows, Rosenberg lured Mr. Churchville into investing ClearPath funds with JER (Rosenberg's company) by having Rosenberg's parents, friends and other close associates invest with ClearPath for the purpose of investing in JER. The participation of Rosenberg's parents in ClearPath (and ultimately into JER) was the final linchpin for Mr. Churchville's decision to have ClearPath invest in JER. (There were a series of loans made by ClearPath to JER most of which included not only Rosenberg's parents but also the close friends and associates of Rosenberg and another co-defendant in the Maryland prosecution, Robert Feldman.) Mr. Churchville questions whether Rosenberg's parents truly lost any money in the JER and RP investments given that their son was the mastermind behind the original JER scheme, of which Mr. Churchville was a victim. Rosenberg alone had possession and control over the books, records and bank accounts of JER and RP, not Mr. Churchville, who had no access to those records or the banking activities. The question raised by Mr. Churchville and his attorneys is whether Rosenberg's parents are truly victims and lost monies as a result of this separate and distinct Ponzi scheme or whether they were used as the initial bait for Mr. Churchville to elect to invest in JER and, after Mr. Churchville took the bait, that the Rosenberg's simply received their funds back from their son when ClearPath invested in JER or wired funds into RP. If the latter is the case, the Receiver should seek a claw back from the Rosenbergs and none of the losses claimed by Linda Rosenberg (Rosenberg's mother) should be considered under U.S.S.G. §2B1.1(b) or payable as restitution in this case. These may be fraudulent claims. Finally, if Rosenberg's parents were in fact real bait used to reel in Mr. Churchville and the Receiver is able to recover funds from the parents, Mr. Churchville should be given credit for those funds, not only against any loss or restitution amounts calculated in this case, but he should likewise receive additional consideration for his substantial cooperation in trying to maximize the value of the Receivership Estate and recover funds for his investors.

Series A&B which brought in over $250,000 in cash; is currently cooperating with the Receiver on a proposed $1,500,000 legal malpractice litigation; conferred with the Receiver on potential liquidation strategies for UPA & PharmLogic; cooperated with the Receiver on the liquidation and distribution of approximately $220,000 in connection with the Macaw holdings; conferred with the Receiver on the liquidation of $175,000 of Data Central; discovered and brought to the attention of the Receiver an additional $14,000,000 of new potential thefts and recoveries from Receivable Partners, Rosenberg, his family and legal counsel.[90] As we write, Mr. Churchville continues to review records provided by the government, to suggest to the Receiver which additional records would be helpful, and to assist the Receiver in any way necessary in these recovery efforts.[91] While Mr. Churchville is unable to ask for or receive any consideration from the government here that would warrant a departure under U.S.S.G §5K1.1, this does not mean that his efforts cannot (or should not) be recognized. In fact, "under [18 U.S.C.] §3553(a)—and in the absence of a U.S.S.G. §5K1.1 motion from the government—[the court can] consider cooperation as a sign of positive character development and or acceptance of responsibility beyond that reflected in the §3E1.1 reduction. [Citations omitted].” United States v. Ochoa-Ramos, 2008 WL 2062341, *3 (E.D.Wis. 05/13/08)(Adelman, J.). Other courts concur. “In particular, the Third Circuit has agreed that the guidelines’ provisions on acceptance of responsibility do not preclude a district court from factoring a defendant’s acceptance and cooperation as part of its §3553(a) analysis. United States v. Severino, 454 F.3d 206, 211 (3d Cir. 2006)(citing United States v. Gatewood, 438 F.3d 894, 897 (8th Cir. 2006); United States v. Lake, 419 F.3d 111, 114 (2d Cir. 2005); United States v. Milne, 384 F.Supp.2d 1309, 1312 (E.D.Wis. 2005)).” United States v. Cannon, 2009 WL 102532, *4 (N.D.Ind. 01/14/09)(Simon, J.).

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[90]Because of the unavailability of traditional cooperation consideration under U.S.S.G. §5K1.1, "the standard reduction for acceptance of responsibility" does not always fully account for a defendant's post-offense activity. However, "[u]nder U.S.S.G. § 3E1.1, courts may consider a number of factors in deciding whether to grant the reduction for acceptance of responsibility. Such factors include: *** voluntary assistance to authorities in the recovery of the fruits and instrumentalities of the offense. . ." United States v. Milne, supra, 384 F.Supp.2d at 1311.

[91]In the cases of the cooperating defendants in the Maryland case, it is easily discernible, from a comparison between their guideline exposure and their actual sentences, that their cooperation with the government played an enormous role in the determination of their ultimate sentences. Mr. Churchville did not have that opportunity here (as noted above), largely because the government's view was that any cooperation that was related to the Maryland defendants (specifically Mr. Rosenberg) was in the hands of the United States Attorney for the District of Maryland. By the time Mr. Churchville was in a position to do anything, the Maryland case was essentially over. There was no Receiver appointed for the entities involved in the Maryland case, and investigation of Rosenberg's assets and other financial dealings was left up to the USAO and the SEC. After Shusterman's trial conviction, the matter appears to have lost its luster, and the Maryland USAO evidently decided not to pursue Rosenberg or his assets, or was unaware that there was something to pursue. Mr. Churchville has given considerable relevant information to the Receiver, but it is unclear whether it can be pursued successfully absent coordination (or at least cooperation) with the government. There are for example financial records obtainable via subpoena that would be useful in identifying and tracing millions of dollars in Rosenberg assets (which were derived from the Maryland fraud). The Receiver may not be able to access them because his authority is limited by the proceedings here, and the Maryland authorities seem less than enthusiastic about expending resources there (and perhaps in other jurisdictions where assets may have been moved [such as New Jersey]). While there is little time left in which to do it, given access to more documents, Mr. Churchville could likely identify more recoverable assets for the investors, and others who participated in and profited from Rosenberg's deceptions.

III. CONCLUSION

A. Variance from the Guidelines

In asking the court to impose a sentence at significant variance with the guidelines, defense counsel respectfully direct the court’s attention to several recent cases in which courts have found it necessary and appropriate to do just that, because the guidelines “have so run amok that they are patently absurd on their face.” United States v. Adelson, 441 F.Supp.2d 506, 515 (S.D.N.Y. 2006). One case that thoroughly explicates the fallacy of rigid application of the guidelines is United States v. Parris, 573 F.Supp.2d 744 (E.D.N.Y. 2008). Parris, like many cases in the Southern and Eastern Districts of New York, was a financial crime (securities fraud) case, in which the defendant brothers were convicted, after trial, of both conspiracy and substantive charges of securities fraud and witness tampering. Their guideline calculations were similar to—but greater than—that at issue here. They began with a base offense level of 7;

added 18 levels for the loss amount; added 6 more levels for the number (more than 250) of victims; added 2 more levels for "sophisticated means"; added 4 more levels because the defendants were officers of a publicly traded company; added 3 more levels for role in the offense adjustments; and, finally, added 2 more levels for obstruction of justice for tampering with witnesses, and providing false testimony and false documents to the SEC. Because of the trial convictions, there was no acceptance of responsibility reduction. The final offense levels were 42. The advisory guideline range was 360 months to life in prison. In part because Senior Judge Block agreed with Judge Rakoff (who decided Adelson) that the court had an obligation to avoid "the utter travesty of justice that sometimes results from the guidelines' fetish with absolute arithmetic, as well as the harm that guideline calculations can visit on human beings if not cabined by common sense" [Parris, 573 F.Supp.2d at 751, quoting Adelson, 441 F.Supp.2d at 512]; and in part because he agreed with the Supreme Court's assessment in Kimbrough v. United States, 128 S.Ct. 558, 575 (2007), that the guideline range "fails to properly reflect §3553(a) considerations" of sentencing [quoting Rita v. United States, 127 S.Ct. 2456, 2465 (2007)], he sentenced the defendants to 60 months in prison—"a departure of 300 months from the low end of the advisory guideline range." Parris, 573 F.Supp.2d at 745. Judge Block was also concerned with what he called "horrific" cases like Enron, WorldCom, and Computer Associates, where the sentences imposed were far less than what the guidelines called for in Parris. 573 F.Supp.2d at 746. He not only considered sentencing disparity, but collected all the relevant cases, compared and analyzed them, and included them in his opinion.[92] Remarkably, the government agreed that the guidelines did not reflect an appropriate sentence for many of the same reasons that concerned the court and, instead of advocating for the imposition of a guideline sentence, worked cooperatively with the court and defense counsel to find a solution to the problem. Id., at 751-753.[93]

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[92]Another noteworthy and relevant case is United States v. Watt, 707 F.Supp.2d 149 (D.Mass. 2010). Watt concerned "what is reported to be the largest conspiracy to commit identity theft in American history." Id., 707 F.Supp.2d at 150. The guideline calculation, which included a loss figure of $20 billion, more than 250 victims, and numerous other guideline enhancements, produced a final offense level of 43. The GSR was life in prison. Since Watt was charged only with conspiracy, the statutory maximum sentence of 5 years trumped the guidelines.

B. Defense Recommendation

Taking into consideration the defendant's loss analysis, as well as the proper role of the guidelines as a sentencing factor in the circumstances of this particular case, along with the other requirements of 18 U.S.C. §3553(a), including without limitation giving due consideration to the avoidance of potentially extreme sentencing disparities and the background and characteristics of the defendant, including his cooperation with the Receiver and the potential for further restitution, Mr. Churchville respectfully suggests that the court impose a non-guideline sentence as follows: that he be incarcerated for a period to be determined by the court but not to exceed 36 months, followed by a term of 12 months to be served in a halfway house, followed by a term of 12 months to be served on home confinement, followed by a term of 3 years' supervised release; and that during the combined period of home confinement and supervised release, he perform a total of 2000 hours of community service as determined by the probation department, along with an order of restitution in the amount of $6,643,997. The defendant further recommends that execution of this sentence be stayed for a period in the discretion of the court, and subject to periodic review in increments of not less than 30 days, for the sole purpose of enabling the defendant to assist the Receiver in the discovery and collection of additional assets

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Nevertheless, he challenged everything about his guideline calculation. The court rejected his guideline challenges, but still varied downward from the statutory maximum and sentenced the defendant to 2 years' incarceration, in order to comply with the requirements of 18 U.S.C. §3553(a).

[93]Parris is a thoughtful, well-reasoned, and thorough opinion which deserves the court's serious consideration.

to be used for restitution or satisfaction of the judgment entered in the civil case against him, and that whenever the court determines that the defendant can no longer be of assistance to the Receiver, he be designated by the Bureau of Prisons to an institution for service of his sentence and self-report at such time as ordered by the court. The defendant, and his counsel, believe that this sentence is in fact "sufficient but not greater than necessary" to achieve the objects of sentencing and to comply with the requirements of §3556(a).

The defendant further requests that, no matter what sentence of incarceration is imposed by the court, he be allowed to self-surrender to whatever institution is designated by the Bureau of Prisons for service of his sentence, and that the court recommend to the Bureau that he be incarcerated in a camp facility as geographically close to Rhode Island as possible.

Respectfully submitted,
Patrick Churchville
By His Attorneys

/s/ *Anthony M. Traini*
Anthony M. Traini (#4793)
56 Pine Street, Suite 200
Providence, RI 02903-2819
Tel: 401.621.4700
Fax: 401.621.5888
Email: amt@atrainilaw.com

/s/ Michael J. Lepizzera, Jr.
Michael J. Lepizzera, Jr. (#4995)
Lepizzera & Laprocina
117 Metro Center Boulevard
Suite 2001
Warwick RI 02886
Tel: 401.739.7397
Fax: 401.384.6960
Email: mlepizzera@leplap.com

CERTIFICATE OF SERVICE

I hereby certify that on March 13, 2017, a copy of the foregoing Defendant's Sentencing Memorandum was filed electronically and served by mail on anyone unable to accept electronic filing. Notice of this filing will be sent by e-mail to all parties by operation of the court's electronic filing system as indicated on the Notice of Electronic Filing. Parties may access this filing through the court's CM/ECF System.

/s/ *Anthony M. Traini*